

Greenfield Die and Manufacturing Corporation and Local 247, International Brotherhood of Teamsters, AFL-CIO and Reno P. Camilleri. Cases 7-CA-37441, 7-CA-37793 and 7-CA-38265

November 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On November 8, 1996, Administrative Law Judge Karl H. Buschmann issued the attached decision in this proceeding. The Respondent filed exceptions and a supporting brief.

On June 6, 1997, the Board issued an Order remanding the proceeding to the judge for analysis of the Respondent's contention that the General Counsel had improperly revoked a settlement agreement, dated October 23, 1995, involving certain alleged violations of Section 8(a)(1) of the Act, and for further consideration of his finding that the Respondent had violated Section 8(a)(3) and (1) of the Act by discharging employee Reno Camilleri. On August 18, 1997, the judge issued the attached supplemental decision. The Respondent filed exceptions to his supplemental decision and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decisions and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

We adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by its discharge of Reno Camilleri, that the Regional Director properly revoked a settlement agreement,² and that the Respondent violated Section 8(a)(1) by various threats and an interrogation by Supervisor Stan Klieb, and by the letter of the Respondent's owner, Don Hinkle, of July 11, 1995, which interfered with Provo's right to engage in Section 7 activities.

Contrary to our dissenting colleague, we also adopt the judge's findings that the Respondent's owner, Don Hin-

kle, coercively interrogated employees Joseph Provo and Elmer Harold Runyon and that the Respondent unlawfully discharged Provo because of his union activities.

1. Regarding the interrogations that our colleague would not find unlawful, the facts show that Hinkle approached Provo outside the Respondent's facility in early June 1995,³ and asked whether Provo was distributing union cards and literature on company time. Hinkle then stated, "We don't have a union here. I don't want a union." Additionally, in either June or July, Hinkle had a brief meeting with Runyon in Hinkle's office. Hinkle asked Runyon why he wanted a union and whether Runyon was passing out union literature on company time. Hinkle, as he did with Provo, told Runyon that he didn't want a union, and added that nobody else did either.

In determining whether an employer's interrogation violates the Act, the Board examines whether under all the circumstances the questioning reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.⁴ In this case, the interrogations occurred against a background of other unfair labor practices in that the Respondent otherwise interrogated employees, threatened employees with reprisals, including discharge, and ultimately discharged both Provo and fellow employee Camilleri. Further, Hinkle was the Respondent's highest ranking official and his interrogation of Runyon occurred in Hinkle's office. Although Provo and Runyon were the leading union activists and engaged in campaign activities on the Respondent's property, we do not find that Hinkle's questioning of them was lawful. Thus, Hinkle specifically asked both employees whether they were campaigning for the Union on company time even though there was no evidence that the employees were doing this. Subsequent events suggest that the inquiry not only lacked any such predicate, but was intended to obtain information for which Provo could be disciplined. Hinkle's further comments to both employees that he didn't want a union were likely to convey the message to Provo and Runyon that he viewed any campaigning by them, whether protected or not, with intense displeasure.⁵ We therefore conclude in these circumstances that Hinkle violated Section 8(a)(1) by interrogating these employees about their union activities.

2. Hinkle reinforced the hostile message of his earlier remarks by giving Provo a copy of the July 11 letter that Hinkle had sent to the Union. The letter suggested that the Union remind Provo that he had legal obligations and that he was required to abide by the Respondent's no-

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In adopting the judge's finding that the Regional Director properly revoked the settlement agreement of October 23, 1995, we rely on the evidence that the Respondent committed an unfair labor practice following the settlement agreement by discriminatorily discharging Camilleri on October 30, 1995. Because the settlement agreement was properly vacated, we do not need to reach the judge's alternative analysis involving the settlement agreement's reservation clause. Cf. *B & K Builders*, 325 NLRB 693 (1998). We also do not rely on any suggestion by the judge that the Respondent's presettlement misconduct in unlawfully discharging employee Joseph Provo also constituted a basis for setting aside the settlement agreement.

³ All dates are in 1995, unless otherwise noted.

⁴ *Emery Worldwide*, 309 NLRB 185, 186, 187 (1993).

⁵ In an interrogation of employee Provo by Supervisor Stan Klieb around the same time, Klieb had threatened Provo by telling him that Hinkle had threatened to fire him or "anyone remotely concerned with the Union."

solicitation policy; and it claimed that Provo had “conducted himself in violation of these restrictions.” Hinkle’s letter concluded by suggesting that the Union “instruct your agent to cease . . . from threatening and coercing employees who have clearly indicated to your agent that they do not wish to participate in the organizing campaign” and by ominously warning, “Continued complaints of threatening and coercive conduct on the part of your agent . . . may result in discipline up through and including discharge for, at least, insubordinate conduct.”

The Board has held that employers violate Section 8(a)(1) of the Act when they invite their employees to report instances of fellow employees’ bothering, pressuring, abusing, or harassing them with union solicitations and imply that such conduct will be punished.⁶ It has reasoned that such announcements from the employer are calculated to chill even legitimate union solicitations, which do not lose their protection simply because a solicited employee rejects them and feels “bothered” or “harassed” or “abused” when fellow workers seek to persuade him or her about the benefits of unionization. While the Board has accepted as lawful an employer’s announced intent to protect employees from “union organizers or other employees” who “threaten” them,⁷ and the Respondent used such language here, the letter taken as a whole has the same destructive effect as the messages found unlawful in the cases cited above. The letter asserts that Provo, allegedly as the Union’s “agent,” has violated the Respondent’s “restrictions” and must “cease” from “threatening and coercing” fellow employees. There is, however, no evidence that Provo had engaged in threats or coercion, so the message to him was that he must cease the lawful union soliciting in which he had been engaged, because employees’ complaints about his soliciting might be taken as evidence of unprotected conduct.⁸ The letter’s threat of “discharge” for “at least, insubordinate conduct” was also, in context, linked to Provo’s solicitation activities. He could reasonably understand the letter as an order to “cease” them if they drew complaints from fellow employees, and a warning that failing to do so could be regarded as insubordination. For these reasons, we find that Hinkle’s letter may reasonably be construed as interfering with, restraining, and coercing employees in violation of Section 8(a)(1).

3. We also adopt the judge’s finding that Provo’s discharge violated Section 8(a)(3) and (1). Provo, whom the Respondent had employed as a building maintenance

janitor for about 3 years, contacted the Union in April about organizing the Respondent’s employees. Provo thereafter distributed union cards to his fellow employees on the Respondent’s property in both the parking lot and the lunch room. His testimony was uncontroverted that he continued to engage in organizing activities from April until his discharge on October 16.

The Respondent, as noted, coercively interrogated Provo and Runyon during the organizing campaign. We also adopt the judge’s findings, as does our colleague, that the Respondent further violated Section 8(a)(1) when supervisor, Stan Klieb, during two separate conversations in June, interrogated Provo, threatened him with discharge and other unspecified reprisals, and told Provo that the Respondent intended to subdivide the business if the employees chose union representation and when Hinkle threatened Provo with discipline in his July 15 letter.

Applying the analysis set forth in *Wright Line*,⁹ we find that the General Counsel has made a prima facie showing sufficient to support an inference that protected conduct was a motivating factor in the Respondent’s decision to discharge Provo. The General Counsel has shown that Provo was the leading union activist and that, as even the dissent concedes, the Respondent through Hinkle and Klieb unlawfully threatened him with discharge.¹⁰ We find in these circumstances that the General Counsel has clearly established that the Respondent’s discharge of Provo was motivated at least in part by its animus towards Provo’s union activities. The burden then shifted to the Respondent to establish, by a preponderance of the evidence, that it would have discharged Provo even in the absence of his union activity. The Respondent argues in its brief that it discharged Provo for an act of insubordination, i.e., refusing a work assignment on the day of his discharge.

With respect to the Respondent’s defense, the record shows that Provo began work at 8 a.m. and soon noticed a bag of trash on the floor outside the press room. When another janitor, Josephine Engler, accused him of leaving the trash in her work area, Provo denied the accusation. Russell Gregg, Provo’s immediate supervisor, then ordered Provo to remove the trash. After Provo claimed that Engler had left trash on his side before, Provo told Gregg that he would remove the trash on completing his work assignment in another area of the facility. When Provo came back to remove the trash, he discovered that it was gone. Later that day, Gregg called Provo into his office and said that Donna Sanderson, the Respondent’s human resources manager, wanted to see him. Sanderson handed Provo two documents, an Employer Warning Report and a Termination Report, and told Provo that he

⁶ See, e.g., *Nashville Plastic Products*, 313 NLRB 462 (1993); *Arcata Graphics*, 304 NLRB 541 (1991); *Eastern Maine Medical Center*, 277 NLRB 1374, 1375 (1985), and cases there cited.

⁷ *Liberty House Nursing Homes*, 245 NLRB 1194, 1197 (1979). Accord: *Arcata Graphics*, supra.

⁸ Although Provo was issued a written reprimand on August 4 and given a 3-day suspension for calling a fellow employee a derogatory term, the incident referred to occurred on the day of the reprimand and thus could not have been the subject of the July 11 letter. In any event, there is no evidence it related to Provo’s union activity.

⁹ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

¹⁰ And Klieb attributed this discharge threat to the Respondent’s owner Hinkle.

was discharged. The Warning Report, signed by Gregg, stated that Provo had been told to pick up certain trash and that he had “refused and stated he was going to see Don Hinkle about this matter” and described the violation as “Refusing to do job that he was told to do.” The Termination Report listed “Standard of Conduct, Insubordination, Threatening, Intimidating, and Intefering with Employees.”

Our dissenting colleague contends that the Respondent established that Provo engaged in “patently insubordinate” conduct on October 16, which Respondent lawfully punished as such, and that Provo’s discharge on that date would have occurred regardless of his union activity because he had previously been warned he would be dismissed for a “third” act of insubordination and this was that third act. In our view, the Respondent has not established this by a preponderance of the evidence.

First, as noted above, the judge credited Provo’s testimony that he had not done what the Warning Report accused him of, i.e., refusing to pick up trash. While he had complained that another employee had placed the trash there, he agreed to pick it up as soon as he had completed his current task in his regular area of assignment; and when he went back to do so, the trash was gone. In light of the judge’s additional finding that the Respondent had previously tolerated Provo’s argumentativeness about “aspects of his job,” it is reasonable to infer that this incident was seized on as a way of getting rid of a union activist—one whom a supervisor had warned that Hinkle intended to “fire,” along with “anyone remotely concerned with the Union.”¹¹ That 4 months had passed since Provo’s overt participation in union activities is not, as our colleague suggests, a reason for concluding that the Respondent was no longer concerned about Provo’s union sentiments. The Respondent had no assurance that Provo would not continue the organizing campaign or seek to revive it if it had lagged. We also agree with the judge that the phrase “threatening, intimidating, & interfering with employees” on the Termination Report, which echoes the phrasing of Hinkle’s unlawful July warning letter, was a reference to Provo’s union solicitation activities and indicates that those activities were still on the mind of the Respondent’s managers.¹²

¹¹ Our colleague notes that Klieb was not in the Respondent’s employ when Provo was fired. We do not regard that as minimizing the significance of the threats conveyed by Klieb. In particular, Klieb attributed the discharge threat to Hinkle, and Hinkle’s own conduct gave credence to that threat.

¹² Our dissenting colleague’s suggestion that the phrase referred to Provo’s conduct toward fellow employee Josephine Engler is based on testimony of Human Resources Manager Sanderson. When questioned about the particulars of her claim that Provo had threatened Engler, however, Sanderson said simply that Engler said Provo had sworn at her and that Provo had admitted swearing. The judge noted generally that “Sanderson’s testimony did not impress me for its truth and veracity.” In describing her reasons for terminating Provo, Sanderson had

Finally, even apart from the character of the October 16 incident, we do not agree that the Respondent has proven that this was simply the implementation of a progressive discipline plan that required discharge for a third incident of insubordination. While there was a reference to “dismissal for third incident of insubordination” on a May 1, 1995, Warning Report issued to Provo, the Respondent did not put into the record evidence of any prior warning for insubordination. Our dissenting colleague notes that the May 1 report cited to a “1st warning” in February 1995 and states that “it seems evident from the wording of the May 1 reprimand that the February discipline also involved a case of insubordination on Provo’s part.” Certainly that is a possibility, but the May 1 Warning Report also suggests there must have been an earlier such report, yet none was produced by the Respondent. We cannot assist the Respondent in carrying its burden of establishing its *Wright Line* defense by drawing inferences in its favor concerning documents of its own that it fails, without explanation, to produce. Neither can we find that the Respondent carried its burden simply on a showing that Provo engaged in some conduct that might be regarded as a legitimate ground for discharge.¹³ It was the Respondent’s obligation to show by a preponderance of the evidence that Provo’s discharge *would* have occurred even in the absence of his union activities, i.e., his initiation of the union campaign. We find that it did not carry that burden, and, accordingly, we affirm the judge’s finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Provo.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Greenfield Die and Manufacturing Corporation, Canton, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER BRAME, dissenting in part.

Although I agree with my colleagues that the Respondent unlawfully discharged employee Reno Camilleri and that, based on Camilleri’s discharge, the General Counsel properly revoked a prior settlement agreement covering alleged 8(a)(1) violations,¹ I do not find, in considering these 8(a)(1) allegations on the merits, that the Respondent violated the Act in every instance alleged as unlawful in the complaint. I would dismiss the allegations that the Respondent’s owner, Don Hinkle, coercively interrogated employees Joseph Provo and Elmer

denied that she was aware of his union activities. The judge found this claim “implausible.”

¹³ *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989).

¹ Like my colleagues, I find it unnecessary to decide whether the settlement agreement’s reservation clause otherwise preserved the discharges of Provo and Runyon for decision.

Harold Runyon about June or July 1995.² Furthermore, contrary to the majority, I would also find that the Respondent lawfully discharged Provo for the reasons stated below.³

1. Regarding Hinkle's alleged interrogations, the evidence shows that, in June, Hinkle briefly met with Provo outside the Respondent's facility. Hinkle asked whether Provo was distributing union authorization cards and literature on company time. Hinkle then told Provo that, "We don't have a union here. I don't want a union." Hinkle had a similar conversation with employee Elmer Harold Runyon in either June or July. After asking Runyon why he wanted a union and whether he was passing out union cards and literature on company time, Hinkle said that he did not want a union and added that nobody else did either.

In rejecting my colleagues' findings that Hinkle coercively interrogated these employees, I stress that both Provo and Runyon were open union supporters who engaged in union activity on the Respondent's property. Hinkle merely asked, in Runyon's case, why he supported the Union and asked both employees whether they were violating the Respondent's no-distribution rule that the judge found was lawful. Hinkle's alleged interrogations were unaccompanied by any unlawful threats and he clearly had the right under Section 8(c) of the Act to inform the employees that he was against unionization.⁴ The Respondent's questioning of open and active union supporters in these circumstances and in the manner it chose was noncoercive and, therefore, did not violate Section 8(a)(1) of the Act.⁵

2. Provo, a janitor, initiated the organizing campaign in April when he contacted the Union and was one of the two leading union activists in the organizing campaign that followed. My colleagues adopt the judge's finding that the Respondent seized on an incident in October (an incident the judge found was neither an act of insubordination nor a refusal to follow a supervisor's order) as a reason to discharge Provo in retaliation for his union activities. Yet, in doing so, they ignore the import of the evidence that the Respondent had lawfully disciplined Provo on three separate occasions, including twice for insubordination, during the 8-month period preceding the final act of misconduct that resulted in Provo's dis-

charge. Based on Provo's work history and the October incident in which Provo disobeyed a direct order by his immediate supervisor, I find, contrary to the majority, that Provo's discharge was lawful.

Regarding Provo's earlier discipline, the record shows that, on May 1, Provo's supervisor, Russell Gregg, issued him a written reprimand for refusing to perform an assigned cleaning task. Under the heading "type of violation," "disobedience" was listed. This reprimand, listed as a second warning, states that Provo had received a verbal warning in February, which was before the advent of the Union, and also states that, if Provo refused to do a cleaning task he was told to do, this would result in Provo's "[d]ismissal for third incident of insubordination."⁶ It thus seems evident from the wording of the May 1 reprimand that the February discipline also involved a case of insubordination on Provo's part.⁷ Thereafter, on August 4, Gregg issued Provo a second written reprimand and a 3-day suspension for calling a fellow employee a derogatory term. Gregg noted on the reprimand that "[t]his verbal abuse cannot be tolerated" and that "[t]his is his third warning." But the "type of violation" was described as "verbal misconduct," not disobedience, insubordination or a refusal to do an assigned task, and Provo was not discharged.⁸

On the day of his discharge, October 16, Provo began working at 8 a.m. in the quality control room. First, fellow employee Josephine Engler, and then Supervisor Gregg accused Provo of leaving trash in Engler's work area. Gregg ordered Provo to remove it. Although Provo claimed that Engler had previously left trash on his side and suggested that Gregg speak to her about it, Gregg insisted that Provo remove the trash. Provo stated that he would remove the trash after he finished his work assignment in another area of the plant. By the time Provo was ready to remove the trash, he discovered that someone else had already done it. On seeing Gregg about an hour later, Provo said that the trash was gone and urged Gregg to speak to Engler about leaving trash in Provo's work area on other occasions.

⁶ The reprimand more fully stated "[b]e advised that if told to perform [sic] a cleaning task and is [sic] refused to it, Joe Provo will receive the following disciplinary action A) Dismissal for third incident of insubordination."

⁷ Gregg testified generally that he had given Provo verbal warnings for his refusal to do a job. Although the majority claims that the Respondent did not establish the lawfulness of Provo's discharge based in part on its failure to introduce a copy of this February warning into evidence, I note first that Provo's May 1 written reprimand refers to the February verbal warning. Second, there is no evidence that Provo challenged the accuracy of this reference on his receipt of the May written warning. And third, the General Counsel does not allege that anything in the May 1 warning is untrue.

⁸ Neither the May nor August discipline was alleged to be unlawful by the General Counsel. The judge, while noting both these disciplines, did not note the context of the May discipline, i.e., that it was a second warning and that Provo was told that a "third incident of insubordination" would result in his dismissal.

² All dates are in 1995, unless otherwise noted.

³ I join my colleagues in finding that the Respondent violated Section 8(a)(1) when supervisor Stan Klieb threatened Provo with discharge and other reprisals in retaliation for Provo's union activities and, in that context, interrogated him, and when Hinkle issued his letter, dated July 11, 1995, accusing Provo of threatening and coercing other employees.

⁴ *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1251 (5th Cir. 1978); *Graham Architectural Products v. NLRB*, 697 F.2d 534, 541 (3d Cir. 1983), rehearing and rehearing en banc denied, 706 F.2d 441 (1983), modified 113 LRRM 3111 (1983).

⁵ *Rossmore House*, 269 NLRB 1176 (1984), affd. sub. nom. *Hotel Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Brigadier Industries Corp.*, 271 NLRB 656 (1984).

That afternoon, Gregg called Provo into his office and said that Donna Sanderson, the Respondent's human resources manager, wanted to see Provo. Sanderson told Provo that he was discharged and handed him two documents, an Employer Warning Report and a Termination Report both signed by Gregg. The Warning Report listed the "type of violation" as "refusing to do job that he was told to do" and stated that the Respondent was terminating Provo "for the reason that [he] has been told that any refusal to follow orders given by his supervisor would lead to dismissal." The Termination Report gave the "Reason for [Provo's] Separation" as "... Standards of conduct, insubordination. Threatening[,] intimidating and interfering with employees."

Although the judge found that the incident on October 16 that led to Provo's termination "does not reveal a persuasive case of insubordination" nor was it "a refusal to follow a supervisor's order," I find to the contrary that Provo's conduct was patently insubordinate. In this case, Gregg ordered Provo to remove the trash and Provo did not do it. Instead, Provo continued to perform other work. Provo had previously received both a verbal and written warning for similar misconduct. Furthermore, Gregg had specifically warned Provo in the May 1 written reprimand that another incident of insubordination would result in Provo's discharge. That is exactly what occurred on October 16.⁹

The section of the Respondent's employee handbook entitled "STANDARDS OF CONDUCT" states in pertinent part: "Violations of the following rules which prohibit the indicated behavior will, in the discretion of the Company, result in disciplinary action up to and including discharge." The Respondent then lists 19 different lettered "rules" that include: "(b) Insubordination (disobedience to authority or failure to follow instructions)" and "(s) Threatening, intimidating, coercing or interfering with employees." Here, the Respondent had disciplined Provo twice for some form of disobedience and once for verbal misconduct directed at another employee in the 8 months before Provo's third incident of insubordination

⁹ My colleagues indicate that Provo did not refuse to pick up the trash. The evidence shows, however, that Provo's immediate supervisor had given Provo a direct order to remove the trash immediately and Provo did not follow it. My colleagues argue that Provo did follow the order by "agree[ing] to pick it up as soon as he had completed his current task." But, Gregg's order was to pick up the trash immediately, and Provo's insistence that he establish the timing was as insubordinate as an outright refusal. To argue that he would have done it in his time misses the point—Provo deliberately refused an order—signaling to any observer that he—not Gregg—was in control.

Further, based on the judge's finding that the Respondent previously had tolerated Provo's argumentativeness on the job, the majority infers that the Respondent seized on this incident as the ground for terminating a union activist. I stress, contrary to my colleagues, that the Respondent had previously disciplined Provo for insubordinate conduct and that the judge's finding that "[t]he Respondent had accepted Provo's argumentative nature in the past" did not forever insulate Provo from further discipline for job misconduct once he engaged in union activities.

in October that caused the Respondent to discharge him.¹⁰ Although my colleagues' stress, in finding that Provo's discharge violated Section 8(a)(3), that, in June, Supervisor Klieb had threatened that the Respondent could terminate Provo because of his union activities, this conduct occurred fully 4 months before Provo's discharge. Thus, I find that Klieb's remarks were too remote in time on which to base a finding that the discharge was discriminatory. And moreover Klieb was no longer employed at the Respondent when Provo was discharged.

I also reject the judge's finding, which the majority adopts, that the statement in Provo's Termination Report that the discharge was also for "[t]hreatening, intimidating, and interfering with employees" was a "clear reference" to Provo's union activities because it is similar to the language in the Respondent's July 11 letter to the Union referencing Provo's union activities. First, the language "[t]hreatening, intimidating, and interfering with employees" in the Termination Report is simply a close approximation of the Respondent's Standards of Conduct "s" which prohibits "threatening, intimidating, coercing, or interfering with employees." Further, the Respondent points to evidence, not discussed by the judge, that the reference is to certain of Provo's alleged conduct toward employee Engler.

In sum, I would find that the Respondent followed a progressive system of discipline in this case by giving Provo a verbal warning and two written reprimands before it terminated him on his fourth violation of the Respondent's work rules and his third incident of insubordination within 8 months.¹¹ The Respondent has demonstrated in the circumstances here that it could no longer tolerate Provo's refusal to obey supervision.¹² In its May 1 written warning to Provo, the Respondent had warned him that another incident of insubordination would result in his discharge and it is clear that the Respondent acted forthwith on this warning when Provo disobeyed Gregg on October 16. Because the evidence here shows that, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Respondent would have discharged Provo even in the absence of his union activities, I find that Provo's discharge was not violative of Section 8(a)(3) of the Act.¹³

¹⁰ As noted, the judge ignored the import of the evidence that Gregg's May 1 written warning to Provo for insubordination specifically stated that another incident of this conduct would result in Provo's termination "for [a] third incident of insubordination."

¹¹ Again, I note that the General Counsel has not argued that any of Provo's earlier discipline violated the Act.

¹² *St. Clair Memorial Hospital*, 309 NLRB 738, 741 (1992) (employee Madden; no violation where refusal to perform work assignment constituted insubordination); *Circuit-Wise*, 306 NLRB 766, 789 (1992) (employee Agosto; no violation where refusal of direct order occurred against backdrop of similar insubordination).

¹³ Cf. *Smiths Industries Inc. v. NLRB*, 86 F.3d 76 (6th Cir. 1996) (no violation where shop steward disobeyed supervisor's specific order that

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DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. These cases were tried on May 29–30, 1996 in Detroit, Michigan, upon a consolidated complaint, dated April 30, 1996. The charge in Case 7–CA–37441 was filed by the Union, Local 247, International Brotherhood of Teamsters, AFL–CIO on July 17, 1995, as amended August 30, 1995. The charge in Case 7–CA–37793 was filed by the Union on October 18, 1995, and amended on January 19, 1996 and January 22, 1996. The charge in Case 7–CA–37793 was filed by Reno P. Camilleri, an individual. The allegations raise issues whether the Respondent, Greenfield Die and Manufacturing Corporation, violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threats, interrogations, and an attempt to impose a no-solicitation rule and Section 8(a)(1) and (3) of the Act by discharging its employees, Joseph Provo, Elmer Harold Runyon, and Reno Camilleri because of the Union.

The Respondent filed timely answers, admitting the jurisdictional elements of the complaint and denying the allegations of unfair labor practices.

On the entire record in this case, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Greenfield Die and Manufacturing Corporation, with an office and place of business in Canton, Michigan, has been engaged in the production, welding, and the manufacture of auto-related bracketry and sub-assemblies. With gross revenues exceeding \$500,000 and purchases of goods valued in excess of \$50,000 directly from points outside the State of Michigan, the Company is admittedly an employer engaged in commerce within the meaning of section 2(2), (6), and (7) of the Act.

The Union, Local 247 International Brotherhood of Teamsters, AFL–CIO is admittedly a labor organization within the meaning of Section 2(5) of the Act.

II. THE SETTLEMENT

On October 23, 1995, the Respondent and the Union entered into an informal settlement in Case 7–CA–37441 which the Regional Director approved on October 23, 1995. By Order of January 25, 1996, he vacated and set aside the settlement. The settlement involved a series of 8(a)(1) allegations (R. Exh. 1). As an affirmative defense to the consolidated complaint and by motion during the hearing, the Respondent objected to the order setting aside the settlement on the grounds that the Company had complied with the terms of the settlement agreement, and that the discharges of employees Provo and Runyon preceded the settlement date. The litigation, insofar as it involves preset-

tlement conduct, is therefore barred, according to the Respondent.

The General Counsel submits that the Respondent violated the terms of the settlement agreement, and that the settlement agreement by express provision does not preclude the General Counsel from prosecuting complaints or the Board from finding violations with respect to matters which precede the date of the approval of the agreement, even if these matters were known to the General Counsel or readily discoverable.

The motion was taken under advisement and will be considered within the context of the record in this case.

III. THE UNCONTESTED FACTS

The Respondent correctly observed that the alleged discriminatees, Provo and Runyon actively participated in concerted protected activity in their attempt to organize the employees of the Respondent during the months from May to early September, 1995. The Charging Party Camilleri did not participate in any union activity and advised both Provo and Runyon that he did not support the union. The Respondent also conceded that the Respondent's President, Don Hinkle, became aware of the union organizing activities of Runyon and Provo, and that Hinkle was formally notified of the union organizing activity by a letter, dated June 21, 1995 from the Union (G.C. Exh. 2). Even prior to receiving the formal indication of the union organizing activity, Hinkle approached both Provo and Runyon and inquired about their union activity. During a brief meeting with Provo outside of a building at Respondent's facility in early June 1995, Hinkle asked whether Provo was involved in handing out union literature and authorization cards on company time. Hinkle further stated: "We don't have a union here. I don't want a union." In June or July 1995, Hinkle had a brief meeting with Runyon in Hinkle's office. Hinkle asked Runyon why he wanted a union and if he was passing out union literature on company time. Hinkle also said that the did not want a union nor did anyone else. Hinkle wrote a letter dated July 11, 1995 to the Charging Party Local 247, suggesting that it remind Provo of his legal obligations as a union organizer and claiming that Provo had threatened and coerced other employees into signing union authorization cards.

On October 16, 1995, Provo was discharged by his supervisor. The Termination Report, dated October 16, 1995, contains as reason: "Standards of Conduct, Insubordination, Threatening Intimidating and Interfering with Employees" (G.C. Exh. 6). An accompanying Employee Warning Report cites the type of violation as "Refusing to do job he was told to do," and contains the following explanation: "I Russell Gregg told Joe Provo to pick up and throw away trash piled up by office door on die room side. Joe Provo refused and stated he was going to see Don Hinkle about this matter" (G.C. Exh. 7).

On September 28, 1995, Harold Runyon was discharged, ostensibly, because of excessive absenteeism after he spent 2 days in jail on charges of criminal misconduct (G.C. Exh. 10).

The Union filed charges regarding the discharge of Provo and Runyon on October 18, 1995 in Case 7–CA–37793. Subsequent to that, on October 23, 1995, the Regional Director had approved the settlement in Case 7–CA–37441.

On October 30, 1995, the Respondent discharged its employee Reno Camilleri for excessive absenteeism after being jailed from October 10 to October 30, 1995 on a drunk driving conviction (G.C. Exh. 15). Camilleri filed a charge on March

steward was not to leave his work station on company time in order to discuss grievance unless he put the grievance in writing).

7, 1996 in Case 7-CA-38265, alleging that the Company attempted to conceal the true reason for the discharge of Runyon.

IV. ADDITIONAL FACTS AND DISCUSSION

Joseph Provo began his employment in April 1992 as a building maintenance janitor. His duties consisted of cleaning floors in certain assigned buildings, run the scrubber, wipe around the presses, wax and clean bathroom floors in the buildings, paint when necessary, and remove the trash. He was one of three maintenance employees. The others were Josephine Engler and Dave Thurman. Provo's supervisor was Russell Gregg.

Provo's union activities began in April 1995, when he contacted Kenny Hollowell, the secretary-treasurer of Local 247 after talking to several employees, including Harold Runyon. Provo, Runyon, and a third employee met with the union official on May 15, 1995 where they signed union authorization cards and received union material for distribution to the other employees. Provo signed an Application for Membership in Local Union No. 247 on May 15, 1995 (G.C. Exh. 16). He distributed the union material in the parking lot and in several plant buildings at lunch and during breaks.

In addition to his conversations about the Union with Hinkle, Provo testified about conversations with Stan Klieb, a supervisor. Provo testified that on June 5, 1995, Foreman Stan Klieb spoke to him in the office at about 11 a.m. and the following conversation occurred:

Yes. He said, "I understand you have priorities like starting a union." He says, "We don't have a union here, I don't want one." I said, "Stan," I said, "are you threatening me?" He said, "No." he says, "Take that as a warning."

Provo recalled another conversation with Klieb on June 9, 1995 at his office (G.C. Exh. 44):

Stan said, "I understand you're passing union cards out," and I said, "Who are my accusers?" and he said, "Oh, then you are?" I said, "I have no comment one way or the other."

....

And he said, "Oh, you got a withdrawal card and your priorities is changed like starting a union." He says, "We don't have a union here, I don't want one." And he said, "Don Hinkle said—" that's the president of Greenfield Die—he said that Don Hinkle said that he was—if the union got in here, he was going to not only subdivide the company into separate entities, but he was going to fire me and anyone else remotely concerned with the union.

On July 11, 1995 Provo was cleaning in the shipping and receiving area. Hinkle handed him an envelope with the comment, "don't read it now." The document was the letter dated July 11, 1995, written by Hinkle and addressed to Local No. 247, where the Company referred to certain employees who are threatening and coercing other employees into signing union cards (G.C. Exh. 4).

His shift began at 8 o'clock in the quality control room. On the day of his discharge, Provo noticed a bag of trash outside the press room in the early morning. Josephine Engler, a fellow employee, accused him of leaving the trash on her side. Provo denied that he had left the bag or that he would ever leave any trash on her side of the building. At about the same, time his supervisor Gregg approached him and accused him of leaving

trash on the press room side and ordered him to remove it. Provo protested, saying that Engler had left trash on his side before, and suggested Gregg speak to her about it. Gregg, however, insisted that the trash be removed. Provo promised to do so within a few minutes when he finished his present work in the lab. Provo then saw his supervisor speaking to Engler. When Provo was ready to remove the trash bag in the press room, it was no longer there. Provo then proceeded to perform his regular cleaning duties. One hour later, Provo saw his supervisor and informed him that the trash was gone and urged him again to do something about Engler leaving trash on his side. At around 3:30 p.m. Gregg summoned Provo to his office and told him that Donna Sanderson wanted to see him. She handed him two pieces of paper, one an Employee Warning Report and the other, the Termination Report. Provo voiced his disagreement with the Company's action and the reasons given for the discharge.

Provo admitted that he had received two prior reprimands, one on May 1, 1995 for refusing to clean up an oil spill and another one on August 4, 1995 for engaging in verbal misconduct, calling a fellow employee a derogatory term (G.C. Exhs. 5, 8, 9). In his testimony, Provo quarreled about the justification for both disciplinary actions, insisting, for example, that his verbal misconduct had been provoked by the other employee. During a meeting on August 4, where the discipline was discussed by his supervisors Gregg said, "We're giving you three working days off. . . . If you don't like things the way they're run here. . . . take it to the union."

Klieb, no longer employed by the Company, did not testify in this case. The comments attributed to him are therefore undisputed. Not only is Respondent's antiunion animus reflected in Hinkle's conversations with Provo, but Klieb's comments reflect the Company deep resentment about the employee's union activity. Klieb's statements clearly constitute threats of reprisals and threats of loss of jobs for those who engaged in union activities. Moreover, Klieb's questioning whether the employee was trying to start a union and engaging in union activities, was coercive. The questioning was accompanied by threats of reprisals that the Company would be divided and that the employees would lose their jobs. In addition, Hinkle's repeated questioning of Provo and his union activities was coercive. He is the chief executive of the company, and he clearly indicated that he was opposed to the employee's conduct. These various threats about the Union and the coercive interrogations about the employee's union activities violate Section 8(a)(1) of the Act.

Hinkle's letter to the Union, a copy of which he handed to Provo, informed him: "He must refrain from soliciting any employee who is in working time and/or in a working area of the plant as well as limiting his union activity to a time when he is not on working time and/or in a working area of the plant as well as limiting his union activity to a time when he is not on working time in a working area of the plant." (G.C. Exh. 4.) This restriction was imposed by its terms only to solicitations for or on behalf of the Union. Such a rule which prohibits only union-related solicitations is presumptively unlawful. However, the employees' handbook contains a general provision entitled "Solicitations and Distributions of Literature" which prohibits solicitation of any kind and for any cause on company property during working time (R. Exh. 3). Respondent's letter may have been intended to express its general policy. I would

therefore dismiss the allegation, because the Respondent has shown that it similarly prohibited other types of soliciting.

The letter threatens “discipline up through and including discharge” for the employees’ union activity which the Respondent characterized as threatening or coercive. I find such conduct to violate Section 8(a)(1) of the Act. With several violations of Section 8(a)(1) of the Act, it is not difficult to conclude that the discharge of Provo was actually motivated by Respondent’s union animus.

Klieb clearly threatened and warned Provo about the loss of his job because of his union activity. His discharge occurred in the fall of 1995 after his union activity during the spring and summer became known to management. While the discharge occurred several months later, the timing may be an indication that the Respondent waited for a particular event or an act of misconduct in order to effectuate a discharge. In any case, the record does not reveal a persuasive case of insubordination. Provo exhibited an undesirable habit of arguing with supervision about certain aspects of his job, in same instances presuming to tell his foreman how to handle certain employment issues. While it is true that Provo did not remove the trash immediately, he did not outright refuse his supervisor’s order. He first argued about it, stating that it was another employee’s responsibility and reluctantly agreed to comply with the order as soon as he had finished his current assignment. When he was finally ready to remove the trash, it had already been done by someone else. His conduct did not, as the Respondent urges clearly amount to an act of insubordination or a refusal to follow his supervisor’s order. Significantly, the Termination Report shows as a reason for separation: “Threatening intimidation and interfering with employees” (G.C. Exh. 6). This was a clear reference to his union activity, as described in Hinkle’s letter to the Union. I, accordingly, find that the Respondent discharged Provo because of his union activity. The Respondent had accepted Provo’s argumentative nature in the past. I further find that the Respondent failed to show that Provo would have been discharged even in the absence of his union activity. *Wright Line*, 251 NLRB 1083 (1980).

The other union activist was Elmer Harold Runyon. He began his job on October 13, 1994, and worked until September 25, 1995. On September 28, 1995, the Respondent discharged Runyon, ostensibly because of excessive absenteeism after he spent 3 days in jail from September 26 to 28 (G.C. Exh. 10).

According to company records, Runyon had incurred two prior Employee Warning Reports for absenteeism, one dated July 27, 1995, and the other September 2, 1995 (G.C. Exhs. 11, 12). Runyon was otherwise regarded as a good employee whose termination report rated his job performance as “good” in all categories except “attendance” (G.C. Exh. 10). Runyon admitted that Pykor had spoken to him on two occasions about his excessive absences.¹

Runyon’s union activity is admitted, as well as his visit to Hinkle’s office. Hinkle asked him why he wanted a union and said that neither he nor anyone else wanted a union. Prior to that incident, Runyon and Provo had the conversation with Supervisor Stan Klieb in the assembly building. They spoke to

Klieb because they had heard that he had been fired. According to Runyon, Klieb said that “Dan Hinkle would sub-divide his business in [an] attempt to stop the union.”

The General Counsel argues even though Runyon was not a “choirboy,” he was discharged because of his union activity.

The clear implication contained in Respondent’s threats was loss of jobs for union activists. Between the president and supervisor Klieb, the message was unequivocal, neither the Union nor its supporters were tolerated at the facility. Provo and Runyon were the most prominent supporters. Their discharges occurred within a few weeks of one another, as soon as the Respondent could find a suitable reason. In Runyon’s case, it was his absenteeism. While the union activity was the underlying motive, the Respondent has nevertheless shown that Runyon would have been discharged even in the absence of his union activity. He had been warned previously that further absences would not be tolerated. According to *Wright Line*, I therefore dismiss the 8(a)(3) allegation with respect to Harold Runyon.

The third individual discharged was Reno Camilleri. It is agreed that Camilleri had no union connections. Nevertheless, the General Counsel argues that Camilleri’s discharge for excessive absenteeism was based on the Respondent’s effort to appear consistent with Runyon’s discipline. Camilleri was discharged on October 30, 1995, after having served almost 3 weeks in jail immediately prior to October 30th.

Camilleri testified that he discussed his impending jail time with the Company’s president in early September 1995. He disclosed to him the nature of his legal problems, involving a possible conviction for “driving under the influence.” Camilleri specifically asked if he would still have a job. Hinkle assured him saying, “We’ll work everything out.” Hinkle conceded in his testimony that he had a conversation with this employee about this subject, but he denied making a promise to Camilleri about keeping his job. For the reasons more specifically discussed below, I have credited Camilleri’s testimony that he indeed had received Hinkle’s assurance. He also caused a letter, dated October 10, 1995 to be delivered by his father to Respondent’s management requesting special leave for the duration of 24 days (G.C. Exh. 14). On October 31, 1995 after 19 days of confinement, he returned to the Company and met Pykor. He welcomed Camilleri and assured him that he had a job. Camilleri changed into his work clothes, he punched in, but was soon told to see Donna Sanderson. She sent him home, because the situation had changed after Runyon’s discharge. In the afternoon, Sanderson called him and told him to come to the office and that he was no longer employed. Despite his protestation to the effect that he had an agreement with Hinkle, Sanderson handed him his termination notice because of extensive time off (G.C. Exh. 15).

Sanderson testified that she has been the human resource administrator since September 11, 1995, and that she was unaware of the employees’ organizational activities until November 1, 1995. She also testified that she initiated the termination without any advice from upper management and in spite of Camilleri’s letter delivered by his father requesting a leave of absence. Sanderson’s testimony did not impress me for its truth and veracity. She would have me believe that the owner and chief executive had no authority to grant a leave of absence to Camilleri or that Hinkle’s promises to Camilleri were totally meaningless. I also find it implausible that she had no knowledge of the union activities of some of its employees. Hinkle’s

¹ I cannot accept the General Counsel’s argument that the warning reports were not genuine. Runyon’s signatures did not appear unusually dissimilar considering that they were compressed in a small space on the warning reports. Denying that he had signed the reports, Runyon admitted, however, that he had received two verbal warnings from Pykor. Runyon did not impress me as entirely candid and honest.

testimony was equally incredible when he answered the question whether he had the ability to grant leave to an employee, "No, I do not." My finding that their testimony lacked truth and candor is also based upon their demeanor which I would describe as not only testy and slightly annoyed but also well rehearsed. For these reasons, I credit Camilleri and find that his termination was union related, namely that his discharge was prompted by Respondent's intentions to conceal its antiunion animus when it discharged Runyon and to appear consistent in its application of the policy on absenteeism. In short, had it not been for the pretextual reason for Runyon's discharge, Camilleri would not have lost his job. He had no prior record of absenteeism, and in the absence of the any union activity he would still be employed.

CONCLUSIONS OF LAW

1. Greenfield Die and Manufacturing Corporation is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. Local 247, International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.
3. Considering the findings of violation of Section 8(a)(3) and (1) of the Act, the General Counsel properly set aside the Settlement Agreement dated October 23, 1995.
4. By threatening employees with reprisals, by threatening them with discharge, and by threatening to subdivide the Company, because the employees were engaged in union activities, the Respondent has repeatedly violated Section 8(a)(1) of the Act.
5. By threatening disciplinary action up to and including discharge for employees, because they engaged in union activities, the Respondent violated Section 8(a)(1) of the Act.
6. By coercively interrogating employees about their union sympathies and activities, the Respondent violated Section 8(a)(1) of the Act.
7. By discharging Joseph Provo because of his union activities, the Respondent violated Section 8(a)(3) and (1) of the Act.
8. By discharging Reno Camilleri in order to conceal the reason for the discharge of a union activist, the Respondent violated Section 8(a)(3) and (1) of the Act.
9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily discharged Joseph Provo and Reno Camilleri, the Respondent shall be ordered to offer them reinstatement to their jobs they previously performed or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed. Further, the Respondent shall be ordered to make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent also shall be ordered to post a notice to employees, as set forth as the appendix to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Greenfield Die and Manufacturing Corporation, Canton, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Discharging or otherwise discriminating against any employee for supporting Local 247, International Brotherhood of Teamsters, AFL-CIO, or any other union.
 - (b) Discharging or otherwise discriminating against any employee to conceal the reason for the discharge of a union activist.
 - (c) Threatening employees with reprisals, threatening them with discharge, and threatening to subdivide the Company, because the employees engaged in union activities.
 - (d) Threatening disciplinary action up to and including discharge, because of the employees' union activities.
 - (e) Coercively interrogating any employee about their support for or activities on behalf of the Union or any other labor organization.
 - (f) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate policies of the Act.
 - (a) Within 14 days from the date of this Order, offer Joseph Provo and Reno Camilleri full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
 - (b) Make Joseph Provo and Reno Camilleri whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.
 - (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this had been done and that the discharges will not be used against them in any way.
 - (d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
 - (e) Within 14 days after service by the Region, post at its facility in Canton, Michigan, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pend-

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 17, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 247, International Brotherhood of Teamsters, AFL-CIO, or any other labor organization.

WE WILL NOT discharge or otherwise discriminate against any of you to conceal the reason for the discharge of a union activist.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten you with reprisals or discharge or a subdivided plant or loss of your jobs because you support or engage in any activities on behalf of the Union or any other labor organization.

WE WILL NOT threaten you with disciplinary action up to and including discharge because of your union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Joseph Provo and Reno Camilleri full reinstatement to their former jobs, or, if that jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Joseph Provo and Reno Camilleri whole for any loss of earnings and other benefits resulting from this discharge, less any net interim earning, plus interest.

Dwight R. Kirksey, Esq. *for the General Counsel.*
Douglas A. Witters, Esq. *(Pollard & Albertson, P.C.),* of
Bloomfield Hills, Michigan, for the Respondent.
Paul Jacobs, Esq. of Detroit, Michigan, for the Charging
Party.

SUPPLEMENTAL DECISION

KARL H. BUSCHMANN, Administrative Law Judge. By Order of June 6, 1997, the Board remanded this case to me for (1) an analysis regarding the General Counsel's revocation of the October 1995 settlement agreement and (2) a clarification of Elmer Runyon's lawful discharge and further clarification of Reno Camilleri's unlawful discharge.

Turning initially to the second issue, because it has a bearing on the former, I found in the underlying decision that the discharge of Elmer Runyon presented a dual motive issue. The General Counsel had presented a prima facie case that the Respondent discharged Runyon because he, like Joseph Provo, was a union activist. Runyon's open support of the Union was conceded by the Respondent. Don Hinkle, the Respondent's president, referred in his testimony to Provo and Runyon as the two union supporters who harassed and bothered the other employees to sign union cards. The Respondent had threatened the employees with discharge because of their union activities. Clearly, Provo lost his job because he was the leading union activist. The union activity was also the motivating factor in Runyon's discharge. However, the Respondent had successfully shown that it would have discharged Runyon even in the absence of his union activity. *Wright Line*, 251 NLRB 1083 (1980).

Runyon had a history of absenteeism. He had received two prior written reports, one dated July 27 and the second on September 2, 1995. He had also received two oral warnings and been told that his absenteeism would no longer be tolerated. After he was absent again, because he spent several days in jail, the Respondent terminated his employment. Under these circumstances, I found that Runyon would have been discharged even in the absence of his union activity.

With respect to Camilleri, the record shows that the Respondent discharged Camilleri in an effort to show consistency with Runyon's discharge and to conceal any antiunion animus. Unlike Runyon, Camilleri was not a union supporter, but like Runyon, Camilleri was absent from work because of time spent in jail. Camilleri had no prior history of absenteeism and until the time of Runyon's discharge on September 28, 1995, Camilleri had an understanding with the Company's president, Don Hinkle, that he would still have a job after his 19 days of confinement. Don Hinkle had assured him in advance that everything would be worked out. In early October, Camilleri made a written request for special leave of absence. On October 30, 1995, when Camilleri reported for work,¹ Supervisor Pykor welcomed him upon his return. However, in a sudden turn of events, Donna Sanderson, human resource administrator, handed Camilleri a termination notice for absenteeism. As explained in the underlying decision, I did not credit the testimony of Don Hinkle generally, and, in particular his testimony that he, the owner and president of the Company, lacked the authority to grant a leave of absence to an employee. I also discredited the testimony of Sanderson, especially the statements, that she had the sole and exclusive authority over personnel decisions and was in charge of the Company's labor policy but that she was totally unaware of the employees' organizational drive or the pendency of the unfair labor practice charges, when she discharged Camilleri. The testimony of Supervisor Henry Pykor was totally unreliable. His responses

¹ Camilleri testified that he returned on October 31, but the termination report was dated October 30, 1995.

indicated that he knew little or nothing about the union activity or the employees' involvement with the Union. I credited Camilleri's testimony and his recollection that Hinkle had made a commitment with him that he would keep his job.

The record shows why the Respondent did not keep its promise. In a conversation with Pykor on the day Camilleri reported for work, Pykor said: "We got a little snag here. We got to discuss this over with our attorneys and we have a meeting about you, because of what happened with Harold" (Tr. 183). Camilleri also spoke to Hinkle pleading for his job. Hinkle told him to go home and wait for a decision. On the following day, Camilleri called Hinkle who told him that the discharge was final but that Camilleri could reapply "after this thing deal blows over" (Tr. 190). I accordingly concluded that the sudden turnabout in the Respondent's attitude was its attempt to appear consistent with the treatment accorded Runyon when he was discharged a month earlier for excessive absenteeism following several days in jail.

The fact that an employee is not a union member and had not engaged in any union activity does not per se immunize an employer's adverse treatment of that employee from answerability under the Act. *Dayton Hudson Department Store*, 324 NLRB 33 (1997). Significantly, the Board has held that the discharge of a nonunion employee to cover up the discharge of an unwanted employee violates the Act. *Jack August Enterprises*, 232 NLRB 881, 900 (1977), *enfd.* 583 F.2d 575 (1st Cir. 1978).

The mere fact that the Respondent has proved affirmatively that he would have disciplined Runyon notwithstanding the Respondent's antiunion animus under *Wright Line*, *supra*, does not vitiate or void the Respondent's antiunion animus, nor should it avoid a finding that the Respondent intended to conceal its actions against Runyon by also discharging Camilleri.² Camilleri had no prior history of absenteeism, nor was there any hint that his job was in jeopardy until the day of his return on October 30. To the contrary, Camilleri had Hinkle's assurance and did everything to keep his job. The Respondent's change in attitude was a clear attempt to treat Camilleri and Runyon equally after each spent several days in jail.

Turning to the first area of concern in the Board's remand Order, I found that the General Counsel properly set aside the settlement agreement of October 23, 1995, and that the Respondent's objections to the Order of January 25, 1996, should be overruled. The Respondent's argument that it complied with the terms of the agreement and that any litigation involving presettlement conduct, including the discharges of Provo and Runyon, is barred, ignores the General Counsel's arguments that the Respondent's compliance with the settlement can only be determined after a hearing on the matter and that the settlement did not encompass the 8(a)(3) and (1) allegations. The General Counsel argued at the hearing that the Respondent had violated the terms of the settlement and that the agreement expressly authorized findings of violations in other cases. The record shows that the settlement was executed on October 23, 1995. Clearly, the discharge of Camilleri in violation of Sec-

tion 8(a)(1) and (3) of the Act occurred subsequently, namely on October 30, 1995.

Moreover, the agreement solely covered the independent 8(a)(1) allegations as contained in the charges filed by the Union on July 17, 1995, as amended on August 30, 1995, in Case 7-CA-37441. The resulting complaint issued on September 8, 1995. The charges involving the discharges of employees Provo and Runyon in Case 7-CA-37793 were filed subsequently, namely on October 18, 1995, and amended on January 19 and 22, 1996. On January 25, 1996, the Regional Director issued an order setting aside the settlement in Case 7-CA-37441 containing the 8(a)(1) allegations, charging that the Respondent had violated the terms of the agreement in that case. He simultaneously issued an order consolidating that case with the complaint in Case 7-CA-37793 containing the 8(a)(3) and (1) allegations dealing with the discharges of Provo and Runyon. The original charges in the second case preceded the settlement date of the first case by 5 days, but the charges were amended subsequent to the October 23 date.

"The Board has long held that a 'settlement agreement may be set aside and unfair labor practices found based on presettlement conduct if there has been a failure to comply with the provisions of the settlement agreement or if postsettlement unfair labor practices are committed.'" *Twin City Concrete*, 317 NLRB 1313 (1995). In the instance case, it is clear that the settlement was properly set aside for both reasons, the Respondent violated the terms of the agreement and it committed unfair labor practices after the settlement. Camilleri's discharge occurred after the settlement and the Respondent violated settlement agreement by the discharges of employees in violation of Section 8(a)(1) of the Act, in spite of its promise in the agreement not to interfere with the employees' Section 7 rights.

Although a settlement agreement ordinarily disposes of all presettlement conduct known to the General Counsel, the settlement agreement provides, *inter alia*:

SCOPE OF THE AGREEMENT — This Agreement settles only the allegations in the above-captioned case(s), and does not constitute a settlement of any other case(s) or matters. It does not preclude persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters which precede the date of the approval of this Agreement, regardless of whether such matters are known to the General Counsel or are readily discoverable. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

The parties thereby agreed to reserve from the settlement certain issues. The 8(a)(1) settlement, basically involving verbal misconduct, clearly did not encompass the 8(a)(3) allegations contained in the second case, where the Respondent retaliated against the employees. *Ratliff Trucking Corp.*, 310 NLRB 1224 (1993).

I accordingly found that the General Counsel's order was appropriate in all respects.

² The reference to "pretextual" discharge in the underlying decision is concededly confusing.